Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,

Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
and
UNITED STATES OF AMERICA,
and
DAVID E. ALLGOOD, ET AL.,

Respondents.

MOTION TO VACATE STAY AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SAMUEL W. TUCKER
HENRY L. MARSH, III
JAMES W. BENTON, JR.
HILL, TUCKER & MARSH
214 East Clay Street
Richmond, Virginia 23219

VICTOR J. ASHE
Suite 704–Plaza One
St. Paul's Boulevard & Plume Street
Norfolk, Virginia 23510

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle, Suite 2030
New York, New York 10019

Counsel for Respondents

Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,

Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
and
UNITED STATES OF AMERICA,
and
DAVID E. ALLGOOD, ET AL.,

Respondents.

MOTION TO VACATE STAY

Respondents Carlotta Mozelle Brewer and others move the Court to vacate the stay of the mandate of the United States Court of Appeals for the Fourth Circuit dated March 7, 1972 by which the United States District Court for the Eastern District of Virginia at Norfolk is directed "to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distances of

their homes." By order of the Court of Appeals filed April 3, 1972, the mandate was "stayed until April 18, 1972, in order to permit the defendants to apply to the Supreme Court for a writ of certiorari, or to apply to that Court for a stay." The petition for a writ of certiorari was docketed on the 13th day of April, 1971.

In support of this motion, the respondents show:

I

1. If the stay of the mandate will be vacated, the district court, in compliance with the spirit of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); may join the Council of the City of Norfolk as a party defendant and require the Council and the School Board to make plans, with increased appropriations as necessary, for providing free transportation for the school children without which, as the Court of Appeals has noted, reassignment for purposes of desegregation "becomes a futile gesture and . . . a cruel hoax." Inasmuch as approximately ninety days are required between order and delivery of school buses (*Bradley* v. *School Board of the City of Richmond*, 324 F.Supp. 456, 459 (E.D. Va. 1971)), the courts should require the School Board to promptly decide whether it will transport children by school buses or, if not, by what practical means free transportation will be provided. In either event, and to avoid diminution of the quality of the educational program (Code of Virginia, 1950, § 22-126.1), the cost should be ascertained and included in the city's budget for the fiscal year which will begin July 1, 1972 (Code of Virginia, 1950, § 15.1-160 et seq.).

2. No injury will be occasioned the School Board or the Council if the stay should be vacated. Even if the district

court should require the *purchase* of school buses and this Court should later hold that Norfolk has no obligation to furnish free transportation to school children under the circumstances of this case, there is a growing national demand for school buses which insures that such properties can be resold with minimal financial loss.

3. In the words of the Court of Appeals in its March 7, 1972 opinion in this case at footnote 6, the respondents allege: "The District Court found the cost of installing and operating a transportation system by the school district to be $3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable."

4. Judicial requirement that the Council and School Board make plans for providing free transportation for school children will not even occasion undue inconvenience but will merely insure good faith performance of the undertaking which the School Board indicated when, in its appli-

cation to the Court of Appeals for the stay, it represented: "The appropriate officials of the School Board and the City of Norfolk are in the process of investigating feasible alternative methods of providing public transportation for the school children and the general public of the City of Norfolk, including the financing thereof."

II

5. If the stay of the mandate will continue in force, the defendant School Board and the Council of the City of Norfolk (which by reason of the School Board's objections has not been made a party hereto) will be free from judicial compulsion to provide transportation for the school children during the 1972-73 school session or to make reasonable plans for such; and thousands of Norfolk school children and their parents, including members of the plaintiff class, will be financially disadvantaged without prospect of recovery or, even worse, children will be required to forego school attendance during the 1972-73 school session by reason of their inability to pay the cost of transportation to distant schools to which they have been assigned pursuant to the constitutional command to desegregate schools.

6. Under the desegregation plan for Norfolk's schools, submitted and approved pursuant to this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and companion cases, an estimated 24,000 school children are assigned to schools which are beyond walking distance from their respective homes; some of the distances being as much as nine miles. Norfolk's public schools have an approximate enrollment of 50,000, more than 16,000 of whom are from low income families as are most of the plaintiff class.

7. During 1971-72, student bus fares in Norfolk were increased from 12½ cents to 17½ cents or from $45 to $63 a year. A predictable result of such fare increase was that more children of low income families would have to forego school attendance because of their inability to pay for transportation.

8. If the stay should continue in effect and this Court should ultimately affirm the judgment of the Court of Appeals, thousands of Norfolk school children from families with low income including many children of the plaintiff class, will have been irreparably injured by the wrongful denial of the means to get to the distant schools to which they were assigned pursuant to the desegregation plan. The reward for their quest for equal educational opportunity will have been, in a very realistic sense, a gross denial of any educational opportunity.

SAMUEL W. TUCKER
Of Counsel for Carlotta Mozelle Brewer, et al., Respondents

SAMUEL W. TUCKER
HENRY L. MARSH, III
JAMES W. BENTON, JR.
HILL, TUCKER & MARSH
214 East Clay Street
Richmond, Virginia 23219

VICTOR J. ASHE
Suite 704–Plaza One
St. Paul's Boulevard and Plume Street
Norfolk, Virginia 23510

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle, Suite 2030
New York, New York 10019

Counsel for Carlotta Mozelle Brewer, et al., Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

	Page
Earlier Aspects of the Case	1
Questions Presented	2
Statement of Additional Facts	3
Reasons for Denying the Writ	4
I. Free Pupil Transportation	4
A. Free Transportation, As Mandated By The Court Below, Is Clearly Required By Prior Decisions Of This Court	4
B. The Apparent Conflict Between Circuits, If Real, Is Insignificant	7
II. Allowance Of Counsel Fees To Plaintiffs	9
III. The Pendency Of The Instant Petition, Coupled With The Stay Granted Pursuant To F.R.A.P. 41(B), Shield The School Board From Its Responsibility To Order School Buses *Now*	11
Conclusion	12

TABLE OF CITATIONS

Cases

Bell v. School Board of Powhatan County, Virginia, 321 F.2d 494 (4th Cir. 1963) 9

Bradley v. School Board of the City of Richmond, 324 F. Supp. 456 (E.D. Va. 1971) 11

Brewer v. School Board of City of Norfolk, Virginia, 434 F.2d 408 1

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 6, 10

Brown v. County School Board of Frederick County, Virginia, 327 F.2d 655 (4th Cir. 1964) 9

Page

Clark v. Board of Education of Little Rock School District, 369 F.2d 661 (8th Cir. 1966) 10

Clark v. Board of Education of Little Rock School District, 449 F.2d 493 (8th Cir. 1971) 7, 9

Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486 (4th Cir. 1964) 9

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 6

Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th Cir. 1969) 10

School Board of Norfolk, Virginia v. Brewer, 399 U.S. 929 2

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 4, 5, 7

United States of America v. Greenwood Municipal Separate School District, et al., ... F.2d ..... (5th Cir. No. 71-2773) 8, 9

Other Authority

Constitution of Virginia (1971) Article VIII, §§ 1, 3 6

Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,

Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
and
UNITED STATES OF AMERICA,
and
DAVID E. ALLGOOD, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EARLIER ASPECTS OF THE CASE

On June 29, 1970 this Court denied the school board's petition for writ of certiorari to the decision of the Court of Appeals for the Fourth Circuit (*Brewer* v. *School Board of City of Norfolk, Virginia*, 434 F.2d 408) which, *inter alia*, directed that "[w]ith respect to elementary and junior high schools, the board should explore reasonable methods of desegregation, including rezoning, pairing, grouping, school

consolidation, and transportation" (*Id* at 412). *School Board of Norfolk, Virginia* v. *Brewer*, 399 U.S. 929.

On or about September 3, 1971 the school board made application to the Chief Justice for a stay of the mandate of the Court of Appeals for the Fourth Circuit which had vacated the district court's August 25, 1971 stay of its July 28, 1971 order requiring transportation of pupils to effect school desegregation; the application having been based on a claim that Executive Order No. 11615, dated August 15, 1971 prohibited the Virginia Transit Company's anticipated fare increase without which the company would not continue to transport children at reduced fares. The school board then asserted: "The only alternative method of obtaining the necessary transportation is for the School Board to establish a school bus system." The application for a stay was denied on September 5, 1971. *School Board of Norfolk, Virginia* v. *Carlotta Mozelle Brewer, et al.*, and *United States of America*, No. ..... October Term, 1971.

On or about September 27, 1971 certain "white defendant-intervenors" made application to the Chief Justice for a stay of the District Court's July 28, 1971 order requiring transportation of pupils to effect school desegregation. The application was denied. *David E. Allgood, etc., et al.* v. *Carlotta Mozelle Brewer et al.*, No. ..... October Term, 1971.

The history of sixteen years of active litigation of this case in the lower courts is set forth in the appendix to this brief.

QUESTIONS PRESENTED

The petitioners' statement of questions presented makes certain assumptions which the respondents are unwilling to admit. Hence, we restate those questions, viz:

1. Whether this school board must defray costs of all transportation which is necessary to the disestablishment of

racial segregation in the public schools and to the maintenance of equality of benefits accorded students similarly situated.

2. Whether an appellate court may mandate an award of counsel fees to successful plaintiffs in a school desegregation case.

3. Whether, by virtue of the stay granted pursuant to F.R.A.P. 41(b), the pendency of the instant petition will absolve the school board of its responsibility to order school buses in sufficient time to furnish transportation during the 1972-73 session.

STATEMENT OF ADDITIONAL FACTS

The board estimates that 24,000 pupils will require transportation. Norfolk's public schools have an approximate enrollment of 50,000, more than 16,000 of whom are in low income families.

Since 1942 Virginia has offered assistance to local school district transportation programs covering maintenance, operating expenditures, bus replacement costs, etc. (25 Tr. 60, 74). Up to 100% of operating expenditures qualify for reimbursement upon the application of a school district.

For many years, the Virginia Transit Company has operated special school busses in conjunction with the school board. These buses are routed to pick up students near their homes each morning and transport them to the school of their assignment. Over the years, the City of Norfolk has subsidized the cost of transporting more than 8,000 students daily, thus permitting them to ride at one-half of the normal fare.

"The District Court found the cost of installing and operating a transportation system by the school district to be

$3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable" (Slip Op. footnote 6).

REASONS FOR DENYING THE WRIT

I.

Free Pupil Transportation

A.

Free Transportation, As Mandated By The Court Below, Is Clearly Required By Prior Decisions Of This Court.

By necessary implication, this Court has shown that this school board must furnish free transportation. In affirming the district court's order in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971), and with specific reference to an optional majority-to-minority transfer provision, this Court indicated:

> "In order to be effective, such a transfer arrangement must grant the transferring student *free* transportation [emphasis supplied] and space must be made available in the school to which he desires to move. Cf. Ellis v. Board of Public Instruction, 423 F.2d 203, 206 (C.A. 5 1970). The court orders in this and the companion Davis case now provide such an option."

It should go without saying that the school board has at least an equal duty to transport students whom it assigns to distant schools to accomplish desegregation as it has to transport the student who voluntarily seeks such assignment to avoid being in a racial majority.

After showing the peculiar appropriateness of the use of transportation in the Charlotte-Mecklenburg (North Carolina) system and in the Mobile, Alabama system as well, the Court in *Swann,* said:

> "Desegregation plans cannot be limited to the walk-in-school." (402 U.S. at 30)

Then the Court mentioned one possible valid objection to transportation of students to accomplish desegregation, i.e., "when the time and distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" (*Ibid*).

In their considerations of plans for the use of transportation to accomplish desegregation, district courts are charged, by *Swann*, to consider the discussions under (1) Racial Balances or Racial Quotas, (2) One-race Schools and (3) Remedial Altering of Attendance Zones. They are not enjoined to measure relief by the extent to which the subject school district may have previously transported students.

The lower courts are charged, by *Swann,* to reconcile competing values, as courts have traditionally done, in fash-

ioning remedial measures. In so doing they must keep in mind the goal of equal educations opportunities for *all* children; those who live near and those who live far from school and, also, those whose parents are affluent and those whose parents are indigent. "Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms." *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 493 (1954). That constitutional imperative transcends fiscal policies and budgetary prerogatives. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964).

Here, the Court of Appeals considered the problem of expense and concluded that the cost of busing in this case is not unreasonably burdensome (Slip Op. p. 8, footnote 6). Quite appropriately, the court, sitting *en banc*, unanimously required this school board "to provide . . . free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes" (Judgment filed May 7, 1972).

Unquestionably, desegregation in Norfolk cannot be accomplished without transportation. It seems to be equally clear, as a matter of paramount law in Virginia, that "public elementary and secondary schools for all children" shall be free, and shall be compulsory for "every eligible child of appropriate age, such eligibility and age to be determined by law" (Constitution of Virginia (1971), Article VIII, Education §§ 1, 3). No child, regardless of the affluence or poverty of his parents (who may or may not be hostile to the desegregation process), can be crushed between the state law which says he must attend school and the federal law which requires his assignment to a school remote beyond his means of locomotion. The court below was imminently correct in holding that "the Court cannot compel the student

to attend a distant school and then fail to provide him with the means to reach that school" (Slip Op. p. 9).

As was demonstrated in *Swann* (402 U.S. at 7), residential patterns in metropolitan areas have resulted from federal, state and local government action; and school board action, particularly, with reference to the sites and sizes of schools, based on these patterns have resulted in segregated education. Now, in obedience to the constitutional mandate to desegregate schools, the state assigns children to schools distant from their homes. Consideration of these facts impelled the court below to hold "that the school district as a part of its plan of desegregation must provide a practical method of affording *free* busing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty [being] for the District Court" (Slip Op. pp. 10-11).

B.

The Apparent Conflict Between Circuits, If Real, Is Insignificant

The school board argues that there is a conflict between circuits concerning provisions of free transportation and points to the one short paragraph in *Clark* v. *Board of Education of Little Rock School District*, 449 F.2d 493, 499 (8th Cir., 1971) wherein the Eighth Circuit altered the district court's free transportation requirement by excluding "students who continue to attend the secondary school closest to their home"; it having been the *feeling* of the Court of Appeals that the constitutional rights of such students have not been or will not be affected. It is quite apparent that the Eighth Circuit overlooked the very likely protest of some excluded student that he must pay for transportation

to and from school while others similarly situated ride shorter distances at public expense.

The reasoning adopted by the *Fourth* Circuit in the instant case finds support in the April 11, 1972 decision of the Fifth Circuit in *United States of America* v. *Greenwood Municipal Separate School District, et al.*, ...F.2d ..... (5th Cir. No. 71-2773) which reversed the district court's denial of free transportation for black students residing in non-contiguous or satellite zones. (The opinion is reproduced in the appendix hereto.) Rejecting the government's suggestion of remand for inquiry by the district court as to the transportation needs of the students and the ability of the school district to meet those needs, the Court of Appeals said:

> "It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here." (Slip Op. pp. 4, 5)

The only uncertainty, if any, is whether equal protection is being accorded the student who is denied free transportation because his school, although beyond walking distance, is the closest school to his home. After considering the cost involved, the court below forestalled the uncertainty, and avoided the further equal protection question, by requiring

free transportation of all students who live beyond normal walking distance. In the *Greenwood* case, the Fifth Circuit did not have before it the facts respecting the needs of the individual students and the ability of the school district to meet those needs. It dealt only with the problem which was most urgent—the transportation of children whom the court had required to be assigned to distant schools. In the *Clark* case, the Eighth Circuit did not state the facts or articulate its reasoning which caused it to "feel that the constitutional rights of the [excepted] students have not been or will not be affected."

The petitioners do not claim that the Fourth Circuit's order requires them to transport a significant number of children from their homes to the closest school. It appears that the difference in budgetary commitment will be slight. Moreover, the appropriate case in which to test the equal protection right of a student to free transportation to a school which, although beyond normal walking distance, is closest to him would seem to be a case in which such a student is a party.

II.

Allowance Of Counsel Fees To Plaintiffs

There is no general rule prohibiting the allowance of counsel fees in the absence of statute. As was pointed out by Judge Winter, especially concurring with the court below, the Fourth Circuit has directed the allowance of counsel fees to plaintiffs in several school desegregation cases, e.g., *Bell* v. *School Board of Powhatan County, Virginia*, 321 F.2d 494 (4th Cir. 1963); *Brown* v. *County School Board of Frederick County, Virginia*, 327 F.2d 655 (4th Cir. 1964); *Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F.2d 486 (4th Cir. 1964), reversed on other grounds, 377 U.S.

218 (1964); *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

Although it then denied the prayer of plaintiff-appellants for an award of counsel fees, the Eighth Circuit in *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661, 671 (8th Cir. 1966), warned: "The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights." In the 1971 appeal of the same case, that court held: "The plaintiff should no longer be required to bear the continuing expense of attorneys' fees to vindicate their constitutional rights. They are entitled to attorneys' fees for services performed by them in processing this appeal and cross-appeal" (449 F.2d at 493).

The respondents are in accord with the views expressed by Judge Winter, concurring specially in the judgment below:

> "The time is *now* when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of 'unreasonable, obdurate obstinacy.'" (Slip Op. p. 30)
>
> "It seems . . . to be appropriate now to hold . . . that reasonable and adequate counsel fees should be awarded as of course unless special circumstances would render an award unjust." (*Id.*, p. 29)

These views are particularly appropriate in the light of this school board's long continued pattern of evasion of its duty to desegregate and its persistent obstruction of the efforts of the plaintiffs to realize the promise of the 1954 *Brown* decision, an outline of which is set forth in the appendix to this brief as "The History of This Litigation In The Lower Courts."

Although the respondents believe that a similar pronouncement from this Court would greatly accelerate the course of school desegregation across the land, they urge denial of the instant petition for reasons above shown and for a further reason next stated.

III.

The Pendency Of The Instant Petition, Coupled With The Stay Granted Pursuant To F.R.A.P. 41(B), Shields The School Board From Its Responsibility To Order School Buses Now

The petition points out that the Virginia Transit Company has served notice on the City of Norfolk that it will terminate service for all passengers on August 23, 1972. This being so, the plan for desegregation of Norfolk's schools may fail for the 1972-73 school session unless the school board will acquire school buses in sufficient number to provide transportation for the students assigned to schools remote from their homes.

In another school desegregation case pending in the Eastern District of Virginia, Richmond Division, the evidence indicated that approximately ninety days are required between order and delivery of transportation equipment (*Bradley* v. *School Board of the City of Richmond*, 324 F. Supp. 456, 459 (E.D. Va. 1971)). But for the stay granted pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and the timely filing of the instant petition, the school board might even now be ordering school buses and seeking appropriation of funds with which to defray the cost of a school transportation system.

Of course, considering the likelihood that the City of Norfolk will assume the operation of the transit system, transportation of school children might be accomplished through that system. In such event, however, the right of

school children to free transportation to distant schools, as recognized by the court below, should not be impaired. During 1971-72, and at the instance of the school board, student fares were raised from 12½¢ to 17½¢ (from $45 a year to $63): If the city-operated transit systems can charge children any amount to get to and from the schools to which they have been assigned, it can charge enough to place free public education beyond the reach of the vast majority of the plaintiff class.

CONCLUSION

Unless the instant petition will be promptly denied or unless the stay will be promptly vacated, this school board may again delay desegregation for yet another year or, even worse, it may deny public education to a large number of the children whose predecessors sought relief at the hand of the federal court in May of 1956.

Respectfully submitted,

SAMUEL W. TUCKER
Of Counsel for Carlotta Mozelle Brewer, et al., Respondents

SAMUEL W. TUCKER
HENRY L. MARSH, III
JAMES W. BENTON, JR.
HILL, TUCKER & MARSH
214 East Clay Street
Richmond, Virginia 23219

VICTOR J. ASHE
Suite 704–Plaza One
St. Paul's Boulevard & Plume Street
Norfolk, Virginia 23510

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle, Suite 2030
New York, New York 10019

Counsel for Carlotta Mozelle Brewer, et al., Respondents

APPENDIX

APPENDIX I

The History Of This Litigation In The Lower Courts

In this sixteen-year-old litigation to desegregate the Norfolk, Virginia public schools, the reported opinions are numerous. Nearly every conceivable tactic to delay, frustrate and avoid the mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) has been raised.

After the complaint was filed in 1956, all action was deferred pending the holding of a planned special session of the Virginia Legislature on the subject of school integration, and then again pending the effective date of the "massive resistance" legislation passed at the special session. On January 11, 1957, the district court denied the school board's motion to dismiss, and on February 12, 1957, the district court entered an injunction against the school authorities restraining them from:

> refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in such school.

Beckett v. *School Bd. of City of Norfolk*, 148 F. Supp. 430, 2 Race Rel. L. Rep. 337 (E.D. Va.), *both aff'd sub nom. School Bd. of City of Newport News* v. *Adkins*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). However, all proceedings were again stayed pending disposition of appeals and petitions for certiorari. It was not until July, 1958 that the school board adopted pupil placement criteria and procedures. The board thereupon denied all 151 applications filed by black students to attend previously all-white facilities during the 1958-59 school year. 3 Race Rel. L. Rep. 945 (1958). The district court ordered the board to

reconsider and on August 29, 1958, the board announced that seventeen of the transfer requests would be granted. 3 Race Rel. L. Rep. 955 (1958). The board sought an additional delay in admitting the seventeen black students, but the district court denied it and the court of appeals affirmed. *Beckett* v. *School Bd. of City of Norfolk*, 3 Race Rel. L. Rep. 1155 (E.D. Va.), *aff'd* 260 F.2d 18 (4th Cir. 1958). On plaintiff's cross-appeal from the district court's refusal to order the admission of the remaining 134 students, the matter was remanded since the district court had indicated he would consider separately the validity and application of the criteria under which the applications were denied. The schools to which the seventeen Negro students were assigned, however, were closed, pursuant to Virginia's "school closing" laws, from the fall of 1958 until February, 1959, when the laws and similar Norfolk City ordinances were declared unconstitutional in *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959; 3-judge court); *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959); *James* v. *Duckworth*, 170 F. Supp. 342 (E.D. Va.), *aff'd* 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959). At that time plaintiffs' supplemental 3-judge court complaint was dismissed as moot, and late in the 1958-59 school year, the district court refused to overturn the board's denial of the 134 transfer applications, holding its placement principles facially constitutional. *Beckett* v. *School Bd. of City of Norfolk*, 181 F. Supp. 870, 870-81 (E.D. Va. 1959), *aff'd sub nom. Hill* v. *School Bd. of City of Norfolk*, 282 F.2d 473 (4th Cir. 1960). The district court subsequently permitted the board to assign pupils by these principles, although holding that the board need not utilize the procedures of the Virginia Pupil Placement Board in view of that agency's policy of not granting any transfer requests. *Beckett* v. *School Bd. of City*

of Norfolk, 185 F. Supp. 459 (E.D. Va. 1959), *aff'd* 181 F.2d 131 (4th Cir. 1960). During 1961 and 1962, the district court had occasion to review and overturn school board denials of black students' transfer requests (unreported opinions) although there was no across-the-board attack on assignment procedures. However, when in 1963 the plaintiffs filed a motion for further relief, the board discarded pupil placement and proposed what has come to be known as the "Norfolk choice" plan—transfer between black and white schools located within the same attendance area. This plan was approved by the district court and on plaintiffs' appeal the court of appeals reversed and remanded for reconsideration in light of its then recent decisions in this field. The district court was specifically instructed to consider the legality or propriety of superimposing a city-wide zone for all-black Booker T. Washington High School on all other city high school zones. *Beckett* v. *School Bd. of City of Norfolk,* 9 Race Rel. L. Rep. 1315 (E.D. Va. 1964), *vacated and remanded sub nom. Brewer* v. *School Bd. of City of Norfolk,* 349 F.2d 414 (4th Cir. 1965). Proceedings subsequent to that remand and negotiations between the parties resulted in the entry of a consent order on March 17, 1966, approving a new desegregation plan. *Beckett* v. *School Bd. of City of Norfolk,* 11 Race Rel. L. Rep. 1278 (E.D. Va. 1966). Under that plan, reluctantly approved by the district court, there were multiple-school zones but at the high school level, transfers between the three white high schools and Booker T. Washington High were permitted only to facilitate integration. The following year, completion of Lake Taylor High School necessitated the filing of an amended plan by the school board, proposing five high school zones, and allowing only Booker T. Washington students to transfer to schools outside their zone of residence. The district

court required that transfer privileges be extended to all high school students but rejected plaintiffs' attacks upon the zone lines and upon the proposed replacement of Booker T. Washington High School on the same site. The court of appeals reversed and remanded, directing the district court to consider, with respect to both issues, whether segregated neighborhood patterns in Norfolk resulted from racial discrimination, of which the board was seeking advantage in its zone lines. *Beckett* v. *School Bd. of City of Norfolk*, 269 F. Supp. 118 (E.D. Va. 1967), *rev'd sub nom. Brewer* v. *School Bd. of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968). The district court found the appellate court's decision "vague and confusing." 302 F. Supp. at 20. Negotiations between the parties following the remand failed to produce agreement. As an interim plan for 1969-70 the school board proposed zone line changes between Lake Taylor and Booker T. Washington to increase integration, and similar changes between Maury and Granby. After hearings in the Spring of 1969, the district court approved the interim plan for 1969-70. *Beckett* v. *School Bd. of City of Norfolk*, 302 F. Supp. 18 (E.D. Va. 1969). After extensive hearings in the Fall of 1969 on the long-range plan of desegregation for 1970-71 and thereafter, the district court approved the school board's submission. *Beckett* v. *School Bd. of City of Norfolk*, 308 F. Supp. 1274 (E.D. Va. 1969). The court of appeals reversed and remanded stating that the plan, whereby 76% of the black elementary pupils would be assigned to 19 all-black schools, 40% of the white elementary pupils would be assigned to 11 white schools, 57% of the black junior high pupils would be assigned to 3 black schools, one all-white junior high school would remain, and segregated high schools would remain, was constitutionally impermissible. *Brewer* v. *School Bd. of City of Norfolk*, 434 F.2d 408 (4th

Cir. 1970). On remand the school board submitted a plan with results similar to those rejected by the court of appeals. The district court accepted the plan with certain modifications. *Bedkett* v. *School Bd. of City of Norfolk*, Civ. Action No. 2214 (E.D. Va. August 14, 1970). All parties except the United States appealed from the district court's decision. The court of appeals delayed its consideration of the case pending this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1 (1971) and companion cases.

On June 10, 1971, *sub nom. Adams* v. *School District No. 5*, 444 F.2d 99 (4th Cir. 1971), the court of appeals remanded to the district court with instructions to receive from the school board a new plan which would give effect to this Court's decisions in *Swann*, *supra*, and *Davis* v. *Board of School Commissioners of Mobile County*, 401 U.S. 333 (1971).

On remand the school board's proposed new plan was approved, as modified, by order of July 28, 1971. On August 25, 1971, in an order indefinitely staying its order of July 28, 1971, the district court allowed the school system to commence the 1971-72 school year under the 1970-71 plan on the ground that Executive Order No. 11615 (the "'price freeze" order) "impeded" the undertaking of the Virginia Transit Company to transport children to school. On September 2, 1971, the court of appeals vacated the stay on the ground that "the School Board cannot avoid its constitutional duty to desegregate the schools by pleading that the bus company might lose money because of the price freeze."

On March 7, 1972 the Court of Appeals decided the appeals of the black plaintiffs and the white intervenors and held that the district court had properly approved the

plan. The Court also held that the Board was required to provide free transportation to pupils who live beyond normal walking distance of their assigned schools and that the board must pay fees to the plaintiffs' attorneys for their service in securing free transportation for the students. *Brewer* v. *The School Board of the City of Norfolk*, ... F.2d ..... (4th Cir. No. 71-1900, March 7, 1972).

APPENDIX II

In The
United States Court of Appeals
for the Fifth Circuit

No. 71-2773

United States of America,

Plaintiff,

versus

Greenwood Municipal Separate School District, et al.,

Defendants,

Lilly Russell, et al.,

Plaintiffs-Appellants,

versus

Greenwood Municipal Separate School District, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

---

(April 11, 1972)

Before Wisdom, Coleman and Simpson, Circuit Judges.

Per Curiam: Once more we are called upon to deal with the desegregation problems of the Greenwood Municipal Separate School District.[1] Pursuant to our remand of June 29, 1971, 445 F.2d 388, 389, for the entry of an order requiring the implementation of a plan complying with former decisions of this Court and with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, the district court ordered the school district to provide free bus transportation to students who elect, on an individual basis, to change schools under the majority-to-minority transfer provision[2] of the District's court ordered desegregation plan. With respect to elementary students who, in accordance with the desegregation plan, were placed in noncontiguous school zones and required to attend school outside their neighborhoods, the lower court declined to require the school district to provide free transportation. The plaintiffs have appealed from the district court's refusal to order free bus transportation for the latter class of students.[3]

---

[1] In chronological order we have dealt with this District's problems in the following cases: *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1969, 406 F.2d 1086, cert. denied 1969, 395 U.S. 907, 89 S.Ct. 1749, 23 L.Ed.2d 220; *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1970, 422 F.2d 1250; *Russell* v. *Greenwood Municipal Separate School District*, 5 Cir., June 29, 1971, 445 F.2d 388; *United States* v. *Greenwood Municipal Separate School District*, 5 Cir., July 2, 1971, 444 F.2d 544, vacated as moot by *en banc* Court, ... F.2d ..... (January 12, 1972). The desegregation suit was originally instituted by the United States in July, 1966.

[2] This provision entitles a student to transfer from a school in which his or her race is in the majority to a facility in which his or her race is in the minority.

[3] The United States as a party to this case did not initiate the motion involved in this appeal, but did participate in the lower court's proceedings and has failed an amicus curiae brief with this Court.

On this appeal, the Negro plaintiffs contend that the failure of the district court to order free transportation for those elementary students placed in noncontiguous zones will require black students transferred to the previously all-white Bankston School to walk two miles each way, across the main lines of the Illinois Central Railroad, through the central business district, across the Yazoo River, and along a main thoroughfare for one-half mile. The school district responds by arguing that the provision of free transportation is merely a matter of convenience for the black elementary students involved, that these black students have no constitutional claim to free transportation, that the school district has never furnished transportation to students who reside within the corporate limits of Greenwood, and that the school district is without funds to provide the requested transportation. The lower court, in addition to giving reasons for its decision essentially similar to those advanced by the school district on this appeal, observed that this court has previously required the provision of free transportation to students who elected to change schools under a majority-to-minority transfer plan but that we have never heretofore directed a school district to provide free transportation for children placed in noncontiguous zones who go to schools outside their neighborhoods.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, supra, the Supreme Court explicitly held that a school district which elects to utilize a majority-to-minority transfer plan as a desegregation tool *must* provide free transportation to each student making a transfer under the plan. 402 U.S. at 26, 27, 91 S.Ct. at 1281, 28 L.Ed.2d at 572, 573. In discussing the pairing and noncontiguous zoning techniques ordered by the trial court in *Swann*, the Supreme Court approved the trial court's direction to the educational authori-

ties that bus transportation be used to implement these techniques:

> "In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

The plaintiffs and the United States are not in agreement as to the appropriate disposition of this case. The plaintiffs urge us to direct the district court to order the school district to provide free bus transportation to the elementary students placed in noncontiguous attendance zones. The United States asks us to remand the cause to the district court with instructions "to permit the parties to present evidence as to the transportation needs of students and the ability of the school district to meet those needs, and to make full findings of fact or opinion and findings."

We have again reviewed the extensive record in this proceeding and conclude that it is unnecessary to remand the cause to the district court for the hearing and findings suggested by the United States. It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them

and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here.

The judgment of the district court, insofar as it refused free transportation to elementary students zoned noncontiguously to attend school outside their neighborhoods, is reversed and the cause is remanded with directions that the district court without delay require the school district to provide such transportation to the affected elementary students.

Let our mandate issue at once.

Reversed and Remanded with directions.

Coleman, Circuit Judge, dissents.